

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-1680

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No.
74-1680

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

MANAGEMENT DYNAMICS, INC., WILLIAM N. LEVY,
EDWIN BARRETT, CLYDE GOFF, EPHRAIM HOFFMAN,
PETER R. WATSON, GLOBAL SECURITIES, INC.,
ALLEN LANGENAUER, DAVID LANGENAUER, BERNARD
OSCHERS, LEE SCHNEIDER, A. J. CARNO, INC.,
ANTHONY NADINO, MAYFLOWER SECURITIES, INC.,
JOSEPH CIRELLO, FAIRFIELD SECURITIES, INC.,
THOMAS F. BRENNAN III, SAMUEL D. HODGE,

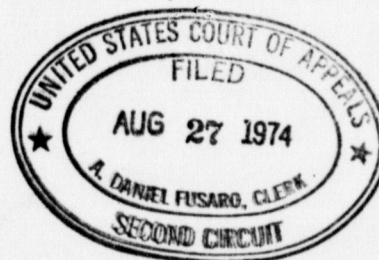
Defendants,

WILLIAM N. LEVY, A. J. CARNO, INC.,
MAYFLOWER SECURITIES, INC., ANTHONY
NADINO, SAMUEL D. HODGE,

Defendant-Appellants.

BRIEF FOR DEFENDANT-APPELLANT SAMUEL D. HODGE

DAN BRECHER, ESQ.
Attorney for Defendant-Appellant SAMUEL D. HODGE
230 Park Avenue
New York, New York 10017
(212) 986-2820



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X Docket No.
74-1680

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

MANAGEMENT DYNAMICS, INC., WILLIAM N. LEVY,
EDWIN BARRETT, CLYDE GOFF, EPHRAIM HOFFMAN,
PETER R. WATSON, GLOBAL SECURITIES, INC.,
ALLEN LANGENAUER, DAVID LANGENAUER, BERNARD
CSCHERS, LEE SCHNEIDER, A. J. CARNO, INC.,
ANTHONY NADINO, MAYFLOWER SECURITIES, INC.,
JOSEPH CIRELLO, FAIRFIELD SECURITIES, INC.,
THOMAS F. BRENNAN III, SAMUEL D. HODGE,

Defendants,

WILLIAM N. LEVY, A. J. CARNO, INC.,
MAYFLOWER SECURITIES, INC., ANTHONY
NADINO, SAMUEL D. HODGE,

Defendant-Appellants.

-----X

BRIEF FOR DEFENDANT-APPELLANT SAMUEL D. HODGE

TABLE OF CONTENTS

Preliminary Statement.....	1.
Statement of Issues.....	2.
Statement of Facts.....	2.
Point I - There was no willful default by Samuel D. Hodge.....	3.
Conclusion.....	6.

TABLE OF AUTHORITIES

Statutes and Other Authorities

Rule 55(b), Federal Rules of Civil Procedure.....	4.
Rule 55(c), Federal Rules of Civil Procedure.....	5.

PRELIMINARY STATEMENT

Defendant-appellant Samuel D. Hodge appeals from the March 29, 1974 decision of Hon. Robert L. Carter, United States District Judge, Southern District of New York, finding him in default herein and enjoining co-defendants Levy, Carno, Nadino, Mayflower, Cirello and Brennan from violating Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder, in connection with Management Dynamics or any other securities. Defendant Hodge appeals from the April 12, 1974 Order of Final Judgment of Permanent Injunction against him and co-defendant Watson.

The Securities and Exchange Commission initiated this action by filing its Complaint on June 13, 1973. Defendants' motions to dismiss, to compel a more definite statement, to sever and to transfer were denied by the Court on September 28, 1973. A full evidentiary hearing pursuant to the Securities and Exchange Commission's motion for a preliminary injunction was held on October 19th and 23rd, 1973. Hodge appeals from the finding that he was in default and the subsequent granting of a final judgment of permanent injunction against him.

STATEMENT OF ISSUES

1. Should the Trial Court have granted a Permanent Injunction when there was no willful default by Samuel D. Hodge as a matter of fact to sustain a finding by the Trial Court that Samuel D. Hodge was in default for failing to appear as a witness.

STATEMENT OF FACTS

This brief will address itself to the question of the default of the appellant Hodge since that was the only stated basis for the Court's Order of Permanent Injunction against appellant Samuel D. Hodge.

Hodge is a resident of Philadelphia, Pennsylvania, where he maintains his residence and his business as a distributor of stereophonic and other recordings. Hodge's wife is completely bed-ridden and she was recently found to be completely blind and disabled by rheumatoid arthritis.

POINT I

THERE WAS NO WILLFUL DEFAULT
BY SAMUEL D. HODGE.

The Court found that defendant Samuel D. Hodge was in default by reason of his failure "to appear as a witness as ordered by the Court during the hearing on this matter."

On October 19, 1973, at the evidentiary hearing on the Commission's motion for a preliminary injunction, at the request of the Commission, the Court ordered the defendant Hodge to appear as a witness at the continuation of the hearing on October 23, 1973.

Defendant Hodge's counsel was present and participating at the hearing on both dates. The Court was informed on both dates that the defendant Hodge would be willing to attend as a witness, but only if granted sufficient time to make arrangements for the care of his wife, an invalid.

On October 19, 1973, the Court had held that a greater length of time given Hodge by the Commission's notice to attend a deposition was not reasonable notice.

Thus, it was illogical and unreasonable for the Court to hold that the Court's order on October 19, 1973 to have Hodge appear on the 23rd was reasonable notice. This was shorter notice than that which the Court had already held to be unreasonable.

The defendant Hodge has never been unwilling to appear at any time in this proceeding. To the contrary, he has expressed his willingness to appear if only given reasonable notice. Thus, his failure to appear on October 23, 1973 was not willful and may not be the basis for the entry of any default against him. This is especially so in view of the fact that he has been represented by counsel who has appeared and actively participated in all phases of this matter.

The Commission cited no rule, case, statute or other basis for the entry of a default against Hodge. They merely stated that he was in default.

Rule 55(b) of the Federal Rules of Civil Procedure requires written notice of an application for judgment to be served upon a defendant who has appeared. Said notice must be served at least three days prior to the hearing on such application. Hodge received no such notice, nor was any such hearing held or scheduled.

Moreover, Rule 55(c) of the Federal Rules of Civil Procedure allows that a judgment by default may be set aside for good cause shown. It is respectfully submitted that Hodge has demonstrated good cause for his failure to appear on October 23, 1973.

Any and all rules or other authorities relating to default of a party require that the Court consider the circumstances which caused the party to fail to obey an order of the Court before any penalty may be imposed upon such a party. Clearly, the defendant Hodge was not willfully disobeying an order of the Court. Moreover, the Commission has clearly not shown that it is entitled to the relief requested on the merits. To grant such relief by default under the circumstances described above would be a gross unfairness to the defendant Hodge.

CONCLUSION

The record shows that there is no proof of any willful disobedience of the Court's order that Hodge attend the October 23, 1973 hearing. To grant an order against Hodge by default with such a clear absence of proof against him would be contrary to the requirement that the defendant actually default or that the plaintiff must show a likelihood of success at trial before even a preliminary injunction may issue.

Dated: New York, New York
August 12, 1974

Respectfully submitted,

DAN BRECHER, ESQ.
Attorney for Defendant-Appellant
Samuel D. Hodge
230 Park Avenue
New York, New York 10017
(212) 986-2820

74-1680

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X Docket No.
74-1680

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

AFFIDAVIT OF
SERVICE

MANAGEMENT DYNAMICS, INC., WILLIAM N. LEVY,
EDWIN BARRETT, CLYDE GOFF, EPHRAIM HOFFMAN,
PETER R. WATSON, GLOBAL SECURITIES, INC.,
ALLEN LANGENAUER, DAVID LANGENAUER, BERNARD
OSCHERS, LEE SCHNEIDER, A. J. CARNO, INC.,
ANTHONY NADINO, MAYFLOWER SECURITIES, INC.,
JOSEPH CIRELLO, FAIRFIELD SECURITIES, INC.,
THOMAS F. BRENNAN III, SAMUEL D. HODGE,

Defendants,

WILLIAM N. LEVY, A. J. CARNO, INC.,
MAYFLOWER SECURITIES, INC., ANTHONY
NADINO, SAMUEL D. HODGE,

Defendant-Appellants.

-----X
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

VICKI EPSTEIN, being duly sworn, deposes and says,
that deponent is not a party to the action, is over 18 years
of age and resides at 230 Park Avenue, New York, New York.
That on the 13th day of August, 1974, deponent served the
within Defendant-Appellant Samuel D. Hodge's Brief upon the
following attorneys at the addresses designated by said

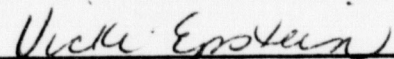
attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

FREDERICK L. WHITE, ESQ.
Attorney for Plaintiff-Appellee
Securities and Exchange Commission
500 N. Capitol Street
Washington, D. C. 20549

BERT GUSRAE, ESQ.
Attorney for Defendant-Appellant
William N. Levy
225 Broadway
New York, New York 10007

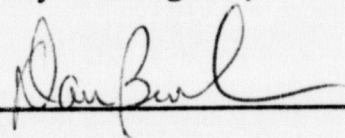
FELDSHUH & FRANK, ESQS.
Attorneys for Defendant-Appellants
A. J. Carno, Inc. and Anthony Nadino
144 East 44th Street
New York, New York 10017

JOEL HANOVER, ESQ.
Borden & Ball
Attorneys for Defendant-Appellant
Mayflower Securities, Inc.
345 Park Avenue
New York, New York 10022


VICKI EPSTEIN

Sworn to before me this

13th day of August, 1974.



DAN BRECHER
Notary Public, State of New York
No. 03-0398940
Qualified in Bronx County
Commission Expires March 30, 1975